



OFFICE OF THE ATTORNEY GENERAL
STATE OF ILLINOIS

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July 6, 2017

Via electronic mail
Mr. Michael Archey
GTM Strategies
mdarchey@mdarcheyllc.com

Via electronic mail
Ms. Helen Shields-Wright
Head Assistant Attorney
Metropolitan Water Reclamation District
Of Greater Chicago
100 East Erie Street
Chicago, Illinois 60611-3154
foiarequest@mwrdd.org

RE: FOIA Request for Review – 2016 PAC 43086

Dear Mr. Archey and Ms. Shields-Wright:

This determination is issued pursuant to section 9.5(f) of the Freedom of Information Act (FOIA) (5 ILCS 140/9.5(f) (West 2016)). For the reasons that follow, the Public Access Bureau concludes that the Metropolitan Water Reclamation District of Greater Chicago did not improperly withhold a proposed agreement responsive to Mr. Michael Archey's July 8, 2016, FOIA request.

On that date, Mr. Archey submitted a FOIA request to the District seeking a copy of "the 'off take' agreement between the District and BP for the Calumet biogas production and beneficial use project[.]"¹ On July 18, 2016, the District responded that because it has not executed an agreement, the responsive agreement is exempt from disclosure pursuant to section 7(1)(h) of FOIA (5 ILCS 140/7(1)(h) (West 2015 Supp.)). Mr. Archey disputes that response.

On August 2, 2016, this office sent a copy of the Request for Review to the

¹FOIA request submitted by Michael Archey to Metropolitan Water District of Greater Chicago (July 8, 2016).

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District and asked it to provide a copy of the record that the District withheld together with a detailed explanation of the factual and legal bases for the applicability of section 7(1)(h). On August 18, 2016, the District furnished those materials. On November 11, 2016, Mr. Archey replied to the District's written response.

DETERMINATION

All public records in the possession or custody of a public body are presumed to be open to inspection and copying (5 ILCS 140/1.2 (West 2016)), and exemptions to disclosure are to be narrowly construed. *Lieber v. Board of Trustees of Southern Illinois Univ.*, 176 Ill. 2d 401, 408 (1997); *see also* 5 ILCS 140/1 (West 2016). A public body "has the burden of proving by clear and convincing evidence" that a record is exempt from disclosure. 5 ILCS 140/1.2 (West 2016).

Section 7(1)(h) of FOIA exempts from disclosure:

Proposals and bids for any contract, grant, or agreement, including information which if it were disclosed would frustrate procurement or give an advantage to any person proposing to enter into a contractor agreement with the body, ***until an award or final selection is made***. Information prepared by or for the body in preparation of a bid solicitation shall be exempt until an award or final selection is made. (Emphasis added.)

When construing the meaning of a statutory provision, the primary objective is to ascertain the intent of the legislature. *See, e.g., DeLuna v. Burciaga*, 223 Ill. 2d 49, 59 (2006). "The plain language of the statute is the best indication of that intent, and if that language is clear and unambiguous, it must be given effect." *People v. Rinehart*, 2012 IL 111719, ¶24, 962 N.E. 2d 444, 452 (2012). The plain language of section 7(1)(h) exempts "proposals and bids" from disclosure only "until an award or final selection is made."

Mr. Archey's Request for Review asserts that the record in question is "an 'agreement' of some form and substance that is **being relied on by the District to make resource allocation decisions**." (Emphasis added.) The District's response to this office explained that after reviewing another company's proposed agreement that included "a long-term offtake agreement with the sale of the biomethane gas and attributes going to BP," * * * the District determined that more favorable terms could be established if the District contracted

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directly with BP."² The District further explained that although the District is actively negotiating an agreement with BP, "[t]he District has not yet sought, and the Board of Commissioners has not yet granted, authority for the District to enter into an offtake agreement with BP."³ The District's response included correspondence documenting that the District continued to negotiate terms of the agreement with BP after Mr. Archey submitted his Request for Review. Mr. Archey replied to the District's response by criticizing the District's procurement process and by questioning its authority to engage in negotiations with BP while denying his firm a similar opportunity.⁴

Based on the available information, the District had not made a final award or selection on the proposed agreement with BP at the time Mr. Archey submitted his FOIA request. Instead, the District was in the process of negotiating contract terms as a precondition to seeking approval from the District's Board of Commissioner's to enter into an agreement. Because the plain language of section 7(1)(h) permits the District to withhold a proposed agreement until a final selection or award is made, this office concludes that the District response to Mr. Archey's request did not violate FOIA.

The Public Access Counselor has determined that resolution of this matter does not require the issuance of a binding opinion. This file is closed. If you have any questions, please contact me at (312) 814-6756.

Very truly yours,



STEVE SILVERMAN
Bureau Chief
Public Access Bureau

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²Letter from Helen Shields-Wright, Head Assistant Attorney, Metropolitan Water Reclamation District of Greater Chicago, to Steve Silverman, Bureau Chief, Public Access Bureau, Office of the Attorney General, State of Illinois (August 18, 2016), at 2-3.

³Letter from Helen Shields-Wright, Head Assistant Attorney, Metropolitan Water Reclamation District of Greater Chicago, to Steve Silverman, Bureau Chief, Public Access Bureau, Office of the Attorney General, State of Illinois (August 18, 2016), at 3.

⁴The Public Access Counselor's authority is limited to reviewing alleged violations of FOIA and the Open Meetings Act (5 ILCS 120/1 *et seq.* (West 2016)). See 15 ILCS 205/7(c) (West 2016)). This office does not have authority to review Mr. Archey's concerns about the District's procurement process.